

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER S. JOHNSON,)	CASE NO. C05-0201-JCC-MAT
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
JAMES SPALDING,)	
)	
Respondent.)	

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Christopher Johnson submitted a proposed habeas corpus petition under 28 U.S.C. § 2254, along with an application to proceed *in forma pauperis*. (Dkts. 1 & 6.) The Court issued an order declining to serve the petition and granting petitioner leave to amend.¹ (Dkt. 7.) The Court noted that petitioner appeared to allege claims that may be brought in an action under 42 U.S.C. § 1983, rather than in a habeas petition under § 2254. The Court, therefore, granted petitioner leave to file either an amended petition under § 2254 or an amended complaint under § 1983.

In response to the Court's order, petitioner submitted a proposed complaint under § 1983. For administrative purposes, the Clerk of the Court assigned petitioner's proposed § 1983

¹ The Court also declined to grant petitioner's *in forma pauperis* application because it was not complete.

01 complaint a new case number (C05-748-MJP-JPD), rather than filing it under case number C05-
02 201-JCC-MAT.² Petitioner did not submit an amended habeas petition under § 2254, although
03 he did file a pleading entitled “Emergency Motion Objecting to Order Declining Service.” (Dkt.
04 8.)

05 Given petitioner’s failure to submit an amended § 2254 petition, the Court issued an order
06 to show cause why this petition should not be dismissed without prejudice. (Dkt. 10.) The Court
07 noted that petitioner’s proposed § 1983 complaint in case number C05-748-MJP-JPD appeared
08 to relate to the issues he initially asserted in his § 2254 habeas petition. The Court advised
09 petitioner that dismissal without prejudice of his habeas petition would not prevent him from
10 pursuing the § 1983 claims asserted in the proposed complaint under C05-748-MJP-JPD. The
11 Court noted that petitioner’s habeas petition appears to assert that he was unlawfully transferred
12 from one state correctional facility to another in late 2004 or early 2005. The Court further noted
13 that, although a prisoner may in certain circumstances challenge a prison transfer through a habeas
14 petition under § 2254, a prisoner must exhaust available state court remedies before maintaining
15 a habeas petition. The Court also noted that, although petitioner asserted that he has a direct
16 criminal appeal pending at this time (Dkt. 8, at 3), he failed to show exhaustion of his remedies
17 in the Washington state courts with respect to claims that the prison transfer in late 2004/early
18 2005 violated his constitutional rights.

19 Petitioner submitted a response to the Court’s order to show cause. (Dkt. 11.) In that
20 response, petitioner asserts that he has been denied access to documentation proving that he has
21 exhausted all state remedies. Petitioner further asserts that the civil suit filed under C05-748-MJP-
22 JPD is not related to the claims in his habeas petition. Finally, petitioner asserts his constitutional
23 right to habeas relief, and argues that his ability to challenge his conviction has been hindered by
24 his unlawful transfer to a mental ward and by the injection of anti-psychotic drugs. However,
25

26 ² Mr. Johnson also has two other proposed § 1983 complaints pending. *See* C05-821-JLR-
MJB and C05-957-JLR-JPD.

01 petitioner's § 2254 petition is nonetheless subject to dismissal without prejudice based on his
02 failure to exhaust.

03 As noted above, under certain circumstances, a prisoner may challenge a transfer from one
04 facility to another by filing a habeas corpus petition under 28 U.S.C. § 2254. *See, e.g., White v.*
05 *Lambert*, 370 F.3d 1002, 1005-1014 (9th Cir. 2004) (proceeding under § 2254 appropriate in case
06 where inmate challenged administrative decision to transfer him from one prison to another).
07 However, state remedies must first be exhausted on all issues raised in a federal habeas petition.
08 28 U.S.C. § 2254(b)-(c). A petitioner may satisfy the exhaustion requirement by providing the
09 highest state court with the opportunity to rule on the merits of the claim or by showing that no
10 state remedy remains available. *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982). *See also*
11 *Carter v. Giurbino*, 385 F.3d 1194, 1196 (9th Cir. 2004) ("Before seeking federal habeas relief,
12 a state prisoner must fairly present all of his claims to the highest state court to provide that court
13 with an opportunity to rule on the merits of the federal claims.")

14 Here, beyond petitioner's bare assertion, there is no indication he exhausted available state
15 remedies. In fact, a review of the documents submitted by petitioner demonstrates the
16 implausibility of petitioner's assertion as to exhaustion. In his motion objecting to the Court's
17 order declining service, petitioner clarified that his writ of habeas corpus challenges only his
18 present confinement in a mental treatment ward. (Dkt. 8 at 4.) A review of the two proposed
19 petitions submitted by petitioner shows that this confinement began as of January 13, 2005. (Dkt.
20 1 at 1 and Dkt. 6 at 6.) Yet, petitioner maintained in a proposed petition filed on January 31, 2005
21 – less than three weeks after his confinement in a mental treatment ward – that he had exhausted
22 all available state remedies. (Dkt. 1 at 2.) He also later appeared to concede in his second
23 proposed petition, filed on February 14, 2005, that he had not exhausted available state remedies
24 by writing "N/A" next to all questions pertinent to the issue of exhaustion. (Dkt. 6.)

25 In sum, it appears that petitioner has not exhausted available state remedies with respect
26 to the claim raised in his proposed habeas petition. Because this petition contains no exhausted

claims, it is subject to dismissal without prejudice. *See, e.g., Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001); *Greenawalt v. Stewart*, 105 F.3d 1268, 1274 (9th Cir. 1997).

For the reasons set forth above, petitioner's petition should be dismissed without prejudice. A proposed Order accompanies this Report and Recommendation.

DATED this 2nd day of June, 2005.



Mary Alice Theiler
United States Magistrate Judge